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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1940

No. 537

314659

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KEN-KRU

A. ATWATER KENT,
Petitioner

v.

WALTER J. ROTHENSIES, Collector of Internal Revenue for the First District of Pennsylvania,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF.

ROBERT H. MONTGOMERY,
JAMES O. WYNN,
THOMAS G. HAIGHT,
LEIGHTON P. STRADLEY,
MAURICE T. MOORE,
J. MARVIN HAYNES,
CHESTER J. MCGUIRE,
GEORGE G. TYLER,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

October Term, 1940

No. ———

A. ATWATER KENT,
Petitioner,

v.

WALTER J. ROTHENSIES, Collector of Internal Revenue for the First District of Pennsylvania,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of A. Atwater Kent respectfully prays for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit to review a judgment of that court entered in this case on May 22, 1941; and therefore shows as follows:

I.

A summary and short statement of the matter involved.

This is an action for the recovery of income taxes paid by the petitioner to the respondent for the calendar years 1932, 1933 and 1934. The United States Circuit Court of Appeals for the Third Circuit reversed (R. p. 99) a decision favorable to the petitioner in the United States District Court for the Eastern District of Pennsylvania (R. pp. 2-12).

On May 20, 1932, the petitioner created three irrevocable trusts (R. pp. 31, 43, 55) called, respectively, the Elizabeth Kent Van Alen Trust, the Virginia Tucker Kent Trust, and the A. Atwater Kent, Jr. Trust (R. pp. 13-14). Elizabeth Kent Van Alen, Virginia Tucker Kent and A. Atwater Kent, Jr. are the children of the petitioner (R. pp. 21, 33, and 46). The petitioner and a trust company were trustees of each of the trusts (R. pp. 13, 14).

These trusts, except for their names and except for the amounts of income to be currently paid to petitioner's children, are identical (R. pp. 21-58). In this petition, except where otherwise indicated, we shall refer to the Elizabeth Kent Van Alen Trust as being typical of the others.

The trust is to continue during the joint lives of the petitioner, the petitioner's wife, and Elizabeth (R. p. 25); or if petitioner and his wife should be divorced, during the joint lives of petitioner and Elizabeth (R. pp. 25-26).

Out of the annual income of the trust, beginning with the year 1933, there was and is to be paid to Elizabeth, if living, sums, beginning in 1933 with $10,000. and increasing at the rate of $5,000. per year until 1946 and subsequent years, when the annual payment to her, if living, is to be

$75,000. Thus in 1934, $15,000. was to be paid to Elizabeth from the income of that year; in 1935, $20,000. And so on[1] (R. pp. 22, 32).

If Elizabeth died prior to the termination of the trust, leaving a child or children her surviving, the trustees were, after Elizabeth's death, to pay to or for the use of each such child a maximum of $10,000. per year out of the income of the trust, provided, however, that not more than one-half of the annual income was to be so used (R. p. 22).

Each item of income received by the trustees, after the deduction of the payments described above to Elizabeth, if living, and to or for Elizabeth's children if Elizabeth were dead, was to be held and accumulated by the trustees until (a) the death of the petitioner, or (b) the June 30th or December 31st of the second year after its receipt, whichever event sooner occurred.[2]

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[1] In the Virginia Tucker Kent Trust, the $10,000 payment to Virginia Tucker Kent was to begin in 1937, if she were then living (R. pp. 34, 44-45); and in the A. Atwater Kent, Jr. Trust, in 1935 if A. Atwater Kent, Jr. were then living (R. pp. 46, 47).

[2] For example, the items of income received by the trustees between May 20, 1932 and June 30, 1932, after deducting any payments from income made to or for Elizabeth's children, if Elizabeth died prior to June 30, 1932, were to be held until the death of the petitioner or until June 30, 1934, whichever event sooner occurred. The items of income received by the trustees in the last half of 1932, after the deduction of any payments made to or for Elizabeth's children, if Elizabeth died prior to December 31, 1932, were to be held until December 31, 1934 or until the sooner death of the petitioner. The items of income received by the trustees in the first half of 1933, after deducting $5,000. (to be paid to Elizabeth, if living) or any payments from income to or for Elizabeth's children, if Elizabeth died prior to June 30, 1933, were to be held until June 30, 1935 or until the sooner death of the petitioner. And so on (R. p. 23).

On each June 30th and December 31st, beginning with the year 1934, if petitioner were living on that date, the trustees were to use not in excess of $5,000. of the accumulation being held to that date, to make up deficiencies in payments from income to Elizabeth or her children during the preceding year, and the balance of the accumulation, or the entire accumulation then being held, if there were no deficiencies in the payments to Elizabeth or her children in the preceding year, was to be paid to the petitioner.[3]

Upon the death of the petitioner any income being accumulated at the time of his death was immediately to be paid to petitioner's wife, if she were living and not divorced from the petitioner; or to Elizabeth, if she were living and if petitioner's wife were dead or divorced from the petitioner (R. pp. 24, 26); or to Elizabeth's husband and issue, in such proportions as Elizabeth should have appointed by

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[3] Thus, on June 30, 1934, if Elizabeth were living, and if during 1933 less than $10,000. was paid to her from 1933 income, or if Elizabeth had died prior to December 31, 1933 survived by a child or children living on June 30, 1934, and if during 1933 less than $10,000. was paid to or for the benefit of each such child, the trustees were to use not more than $5,000. of the income received by them between May 20, 1932 and June 30, 1932 to make up such deficiencies and were to pay the balance of such income to the petitioner (R. p. 23).

Similarly, on December 31, 1934, if petitioner were living $5,000. of the income received by the trustees during the last half of 1932 was to be used first to make up deficiencies in 1933 payments to Elizabeth or her children and the balance was to be paid to the petitioner. And so on. *As noted on pages 5 to 7 of this petition $10,000. of the 1934 accumulations in the Elizabeth trust, and $10,000. of the 1934 accumulations in the Atwater Jr., trust, were used to make up the 1935 deficiencies in income to Elizabeth and Atwater, Jr., and, although taxed to the petitioner, were never received by him.*

will (R. p. 25); and so on down through a long line of contingent remaindermen (R. pp. 25, 59-64), including a possible second wife of the petitioner and possible children by a possible second wife of the petitioner (R. pp. 63-64), the final one of which was The Atwater Kent Foundation, a charity (R. pp. 26, 64).

The trust provided, *inter alia*,

> "Under no circumstances or method of accounting shall the grantor, or his estate, his heirs, next of kin or assigns become entitled to any interest on accumulated items or to any income of the trust fund received, earned or accrued subsequent to the day which proves to be two years before the death of the grantor" (R. p. 24).

On December 31, 1932, 1933 and 1934, the trustees held taxable income received by them during said years, respectively (R. p. 15), which they included in federal income tax returns filed by them, respectively, for said years. The trustees paid the taxes shown to be due by said returns (R. p. 20).

On June 30 and December 31 in the years 1934 and 1935, respectively, the trustees paid to the petitioner the balances remaining of said amounts held on December 31, in the years 1932 and 1933, after the deduction of taxes paid by the trustees on said income, losses on sales of securities in which said income had been invested and certain incidental expenses (R. pp. 15-16, 71-76).

During the year 1935 the Elizabeth Kent Van Alen Trust and the A. Atwater Kent, Jr. Trust received no net income, and the trustees of these trusts were therefore unable to pay to Elizabeth and to Atwater, Jr. the amounts due them (R. pp. 16, 22, 32, 47, 57).

On June 30 and December 31, 1936 the trustees of the Elizabeth Kent Van Alen Trust paid Elizabeth, out of the

income received by them in 1934 and still held by them, a total of $10,000 to make up, to the extent permitted by the trust, the deficiency in her 1935 income. Similarly, on the same dates the trustees of the A. Atwater Kent, Jr. Trust paid Atwater, Jr., out of the income received by them in 1934 and still held by them, a total of $10,000 for the same purpose (R. p. 36).

On June 30 and December 31, 1936, the trustees of the three trusts, respectively, paid to petitioner the balances remaining of said amounts held on December 31, 1934 after the deduction of the payments to Elizabeth and Atwater, Jr. mentioned in the preceding paragraph, after the deduction of taxes paid by the trustees on said income, after the deduction of losses on sales of securities in which said income had been invested, and after the deduction of incidental expenses (R. pp. 16, 75-76).

Respondent collected taxes from the petitioner for the calendar years 1932, 1933 and 1934 based upon the inclusion in petitioner's income of the *total* amount of the taxable net income received by the trustees during said years and held by them, respectively, as aforesaid on the last day of each of said years (R. pp. 18-19). From the above it is apparent that, while the respondent collected income taxes from the petitioner upon the addition of the total amount of the taxable net income received by the trustees and held by them at the end of the calendar years 1932, 1933 and 1934, respectively, not only was it impossible to tell for whom such income was accumulated during each of the three years respectively, but *the petitioner in fact never received the amount of the accumulated income upon which he was taxed.* The following table shows the amounts taxed to the petitioner for the years 1932, 1933 and 1934 and

the amounts actually received by him in 1934, 1935 and 1936:[4]

Taxable Year	Accumulations Taxed to Petitioner	Accumulations Actually Received By Petitioner
1932	$255,500.	$208,100.[5]
1933	159,500.	149,500.[6]
1934	154,600.	120,400.[7]

The difference between the accumulations in column 2 and the payments in column 3 for the years 1932 and 1933 is principally due to the payment by the trustees of income taxes on the accumulated income. Of the difference for 1934 ($34,200.), however, $20,000., or over fifty-eight per cent. (58%) thereof, was due to payments which the trustees were required to make to Elizabeth and Atwater, Jr.

The petitioner and the three trusts during the years in question kept their books of account and filed income tax returns upon the cash receipts and disbursements basis (R. p. 20).

After the filing (R. pp. 19-20, 77-85) and rejection of claims for refund (R. p. 20) the petitioner brought suit against the respondent in the United States District Court for the Eastern District of Pennsylvania for the recovery of the taxes paid as aforesaid. The district court entered a judgment in favor of the petitioner (R. p. 2). The respondent appealed to the United States Circuit Court of Appeals for the Third Circuit which reversed the district court (R. p. 99).

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[4] In this petition and brief, dollars are, for convenience, stated in terms of the nearest one hundred.

[5] Received in 1934.

[6] Received in 1935.

[7] Received in 1936.

II.

A statement particularly disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review the judgment of the Circuit Court of Appeals for the Third Circuit.

(a) The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States.

The Supreme Court of the United States has jurisdicton to review the judgment of the Circuit Court of Appeals by reason of the provisions of Section 347 of Title 28 of the Code of Laws of The United States of America, 1934 ed.

(b) The date of the judgment sought to be reviewed and the date upon which the petition for a writ of certiorari is presented.

(1) The date of the judgment sought to be reviewed is May 22, 1941 (R. p. 99).

(2) The date upon which the petition for a Writ of Certiorari is presented is August 22, 1941.

III.

The Question Presented.

The question presented is as follows:

Is the income of a trust, which is held or accumulated for future distribution to a person or persons whose identity cannot be determined until the happening of unpredictable events, but who may or may not be the grantor, held or accumulated for future distribution to the grantor?

IV.

The reasons relied on for the allowance of the writ.

The reasons relied on for the allowance of the writ of certiorari are as follows:

1. The Circuit Court of Appeals for the Third Circuit has rendered a decision in conflict with the decision of the Circuit Court of Appeals for the Tenth Circuit in *Commissioner of Internal Revenue* v. *Dean,* 102 F. (2d) 699, on the same matter. In the *Dean* case it was held that income held by a trustee on December 31 for distribution to a beneficiary, *if living,* on the succeeding January 3, was not held for distribution to said beneficiary but was held for distribution to unascertained persons or persons with contingent interests. In the instant case, the Circuit Court of Appeals for the Third Circuit has held that income held by a trustee on December 31, for distribution to the petitioner, if living, on the June 30 and December 31 of the second succeeding year, was held for future distribution to the grantor and was not held for future distribution to unascertained persons or persons with contingent interests.

The Government did not apply to this court for a writ of certiorari in the *Dean* case.

2. The Circuit Court of Appeals for the Third Circuit has decided an important question of federal law,—namely,

> That the income of a trust which is held or accumulated for future distribution to a person or persons

> whose identity cannot be determined until the happening of unpredictable events, but who may or may not be the grantor, is held or accumulated for future distribution to the grantor.

which has not been, but should be settled by the Supreme Court of the United States.

3. The Circuit Court of Appeals for the Third Circuit has rendered a decision in conflict with the decisions of the United States Board of Tax Appeals in a series of cases on the same matter. These cases are *Boeing* v. *Commissioner,* 37 B. T. A. 178; *Pyeatt* v. *Commissioner,* 39 B. T. A. 774; *Moore* v. *Commissioner,* 39 B. T. A. 808; *Estate of Edward Johnson* v. *Commissioner,* unreported memorandum decision entered May 29, 1939; *Ward* v. *Commissioner,* 40 B. T. A. 225; *McLean* v. *Commissioner,* 41 B. T. A. 565; *Wilson* v. *Commissioner,* 42 B. T. A. 1260 and *Baker* v. *Commissioner,* 43 B. T. A. 1029.

In only one of these cases (*Wilson* v. *Commissioner,* 42 B. T. A. 1260, *supra*) *has the government prosecuted an appeal on the point involved in this case.*

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this honorable Court directed to the United States Circuit Court of Appeals for the Third Circuit, commanding that court to certify and send to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in this cause to the end that the said cause may be reviewed and determined by this court according to law; and that

your petitioner may have such other and further relief as to this court may seem proper and in conformity with law.

And your petitioner will ever pray.

ROBERT H. MONTGOMERY,
JAMES O. WYNN,
LEIGHTON P. STRADLEY,
J. MARVIN HAYNES,
CHESTER J. MCGUIRE,
Counsel for Petitioner.

Dated: August 22, 1941.

PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions of the Courts Below.

The opinion of the Circuit Court of Appeals for the Third Circuit is reported in 120 F. 2d. at page 476. (See pp. 92-98 of the record.) The opinion of the United States District Court for the Eastern District of Pennsylvania is reported in 35 Federal Supplement at page 291 (see pp. 3-12 of the record).

Jurisdiction.

The grounds on which the jurisdiction of the Supreme Court of the United States is invoked are set forth beginning at page 9 herein, in the petition for writ of certiorari.

Statement of the Case.

The facts are as set forth, beginning at page 2 herein, in the petition for writ of certiorari.

Specification of Errors.

1. The Circuit Court of Appeals for the Third Circuit erred in finding and holding that the income of a trust, which is held or accumulated for future distribution to a person or persons whose identity cannot be determined until the happening of unpredictable events, but who may or may not be the grantor, is held or accumulated for future distribution to the grantor.

2. The Circuit Court of Appeals for the Third Circuit erred in finding and holding that the income from the three trusts here involved was held or accumulated for future distribution to the grantor.

3. The Circuit Court of Appeals erred in reversing the decision of the District Court of the United States for the Eastern District of Pennsylvania.

4. The Circuit Court of Appeals for the Third Circuit erred in entering judgment for the respondent.

SUMMARY OF THE ARGUMENT.

Sections 161 (b)[8] of the Revenue Acts of 1932[9] and 1934[10] provide that the tax upon the income of a trust shall be paid by the fiduciary except such part of the income as is held or accumulated for future distribution to the grantor, within the meaning of Section 167[11] of said statutes. Therefore, unless the income of the trusts here involved was held or accumulated for future distribution to the grantor (the petitioner), the tax thereon is to be paid by the respective trustees and not by the petitioner.

The income of the trusts was not held or accumulated for future distribution to the grantor. Section 167[11] of the Revenue Acts of 1932 and 1934, being an exception to a general rule, is to be strictly construed, and since the section is a part of a fiscal statute, any doubts are to be resolved in favor of the taxpayer. The income of the trusts was held or accumulated for future distribution to a person or persons whose identity could not be determined until the hap-

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[8] 47 Statutes at Large, Public Volume I, p. 219; 48 Statutes at Large, Public Volume I, p. 727, U. S. C. (1934 ed.) p. 1058.

[9] 47 Statutes at Large, Public Volume I, p. 169.

[10] 48 Statutes at Large, Public Volume I, p. 680; U. S. C. (1934 ed.) p. 1035.

[11] 47 Statutes at Large, Public Volume I, p. 221; 48 Statutes at Large, Public Volume I, p. 729, U. S. C. (1934 ed.) p. 1059.

pening of unpredictable events, and hence could not have been held or accumulated for future distribution to the grantor.

It follows that the income of the trusts was taxable to the trustees and not to the petitioner.

ARGUMENT.

I.

The tax upon the income of the trusts is to be paid by the respective trustees unless the said income was held or accumulated for future distribution to the grantor (the petitioner).

Sections 161(b)[12] of the Revenue Acts of 1932[13] and 1934[14] provide:

> Computation and payment. . . . The tax[15] shall be computed upon the net income of the . . . trust and shall be paid by the fiduciary, except as provided in . . . section 167 (relating to income for benefit of grantor). . . .[16]

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[12] *Supra*, footnote 8, page 14.

[13] *Supra*, footnote 9, page 14.

[14] *Supra*, footnote 10, page 14.

[15] The income tax. Section 161 is a part of Supplement E (47 Statutes at Large, Public Volume I, p. 219; 48 Statutes at Large, Public Volume I, p. 727, U. S. C. (1934 ed.) p. 1058) entitled "Estates and Trusts" of Subtitle C (47 Statutes at Large, Public Volume I, p. 191; 48 Statutes at Large, Public Volume I, p. 700, U. S. C. (1934 ed.) p. 1046) of Title I, (47 Statutes at Large, Public Volume I, p. 169; 48 Statutes at Large, Public Volume I, p. 680, U. S. C. (1934 ed.) p. 1035) entitled "The Income Tax".

[16] The section is quoted in full in the Appendix to this brief beginning at page 31.

Since the income here involved is the income of trusts, the income tax thereon should be computed upon the net income of the trusts and paid by the respective trustees except as provided in Section 167.[17]

Section 167, in so far as pertinent [18] provides:

> (a) Where any part of the income of a trust—(1) is . . . held or accumulated for future distribution to the grantor . . . then such part of the income of the trust shall be included in computing the net income of the grantor.

In the instant case the income was held or accumulated for future distribution to someone. If that "someone" was the grantor, then the income should be included in computing the net income of the grantor. On the other hand, if that "someone" was not the grantor, the tax, pursuant to Section 161(b), should be computed upon the net income of the trust and should be paid by the respective trustees.

II.

The income of the trusts was not held or accumulated for future distribution to the grantor.

A. Section 167 is an exception to a general rule and as such is to be strictly construed.

As we have previously stated, the general rule, enunciated by Section 161(b), is that the tax on the income of a

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[17] *Supra*, footnote 11, page 14.

[18] The section is quoted in full in the Appendix to this brief beginning at page 31.

trust is to be paid by the trustee. Section 167 is, in the language of the Congress, an exception to that rule.

> ". . . *except* as provided in . . . Section 167 . . ." (Section 161(b))

> "Exceptions contained in statutes are to be construed strictly." (*Great Atlantic & Pacific Tea Co.* v. *Federal Trade Commission*, 106 F. (2d) 667.)

> "Unlike that of the proviso, however, it is apparent that the position of the exception in the statute, is unimportant. But the exception is also subject to the rule of strict construction; that is, any doubt will be resolved in favor of the general provision and against the exception, . . ." (*Crawford Statutory Construction*, Sec. 229, p. 610).

> ". . . we are led to the general rule of law which has always prevailed, and become consecrated almost as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause; and those who set up any such exception, must establish it as being within the words as well as within the reason thereof." (*United States* v. *Dickson* (15 Pet. (40 U. S.) 141, 165).)

Consequently, if there is any doubt as to whether the accumulated income of the trusts was to be distributed to the grantor, that doubt will be resolved in favor of the general provision,—i. e., the provision that the income is taxable to the respective trustees.

B. Section 167 is a part of a fiscal statute, and consequently, if there is any doubt as to its meaning, such doubt is to be resolved in favor of the taxpayer.

> "On behalf of the government it is urged that taxation is a practical matter, and concerns itself with the substance of the thing upon which the tax is imposed, rather than with legal forms or expressions. But in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the government and in favor of the taxpayer. *Gould* v. *Gould,* 245 U. S. 151, 153, 62 L. ed. 211, 213, 38 Sup. Ct. Rep. 53. The rule is stated by Lord Cairns in *Partington* v. *Atty. Gen.* L. R. 4 H. L. 100, 122.
>
> 'I am not at all sure that in a case of this kind—a fiscal case—form is not amply sufficient; because, as I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.' And see *Eidman* v. *Martinez,* 184 U. S. 578, 583, 46 L. ed. 697, 701, 22 Sup. Ct. Rep. 515." (*United States* v. *Frederick L. Merriam,* 263 U. S. 179, 187.)

C. The income of the trusts was held or accumulated for future distribution to a person or to persons whose identity could not be determined until the happening of unpredictable events.

Respondent does not and cannot deny that on December 31st of each of the years 1932, 1933 and 1934, the trustees did not and could not know for whom they held the accumulated income with respect to which the petitioner is being taxed. For example the income received during the first half of 1934 by the trustees of the Elizabeth Kent Van Alen Trust and held on December 31, 1934, was distributable to petitioner's wife, if petitioner died prior to June 30, 1936, if she survived him and was not divorced from him. It was distributable to Elizabeth, if petitioner died prior to June 30, 1936 and if petitioner's wife did not survive him or was divorced from him. It was distributable to Elizabeth's issue and husband or to her issue alone, if she left no husband, if the petitioner died prior to June 30, 1936, if petitioner's wife predeceased him or was divorced from him, and if Elizabeth predeceased him. It was distributable to the beneficiaries of the General Family Trust (p. 58; Joint Exhibit 4) (including Virginia Tucker Kent, A. Atwater Kent, Jr., and their issue, a possible second wife of petitioner and possible children by a second marriage of petitioner, and The Atwater Kent Foundation, a charity), if petitioner died prior to June 30, 1936, if petitioner's wife predeceased him or was divorced from him, and if Elizabeth predeceased him, survived by neither husband nor issue. The income was not in its entirety distributable to the petitioner even if he lived until June 30, 1936; a part of it was

to be paid (and in fact a part of it was paid[19]) to Elizabeth to make up a deficiency in the payments made to her from 1935 income. *The income was in its entirety distributable to the petitioner only if it was not diminished by expenses; if the petitioner lived until June 30, 1936; if during 1935 $20,000. was paid to Elizabeth from the income of that year, if Elizabeth was alive during any part of the year 1935; or if Elizabeth died prior to December 31, 1935, if $10,000. of the 1935 income was during 1935 paid to or for the benefit of each child who survived her.*[20]

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[19] The decision of the Circuit Court of Appeals taxes to the petitioner income over which he has no control, income which he has not received and never can receive. For example, of the 1934 accumulations in the Elizabeth Kent Van Alen trust amounting to $41,600., petitioner in 1936 received only $29,800. Of the difference ($11,800.), $10,000. was payable to, and was paid to, Elizabeth pursuant to the terms of the trust. Thus, petitioner is being taxed upon income to which another had an unqualified right.

[20] *The decision of the Circuit Court of Appeals will result in the petitioner paying more in income taxes than he will, if he lives, receive from the trust, unless the net income of each trust annually exceeds $66,666.66.* For example, assume that the net income of the Elizabeth Kent Van Alen Trust is $65,000. for the current year, 1941. One-half of that amount or $32,500. will be paid to Elizabeth, leaving $32,500. to be accumulated, upon which petitioner will pay, under the circuit court's decision, a tax in 1942 of not less than seventy per cent. or $22,750. Assume that in 1942, the income of the trust is again $65,000. One-half thereof or $32,500. will be paid to Elizabeth. On June 30 and December 31, 1943, however, the trustees will be required to pay Elizabeth a total of $10,000. because the said $32,500. was less than the $55,000. she was supposed to receive in 1942. The deduction of this $10,000. will leave only $22,500. to be paid to petitioner on June 30 and December 31, 1943, if he be then living, although he will have paid $22,750. in income taxes in 1942 on account of the 1941 accumulated income.

(Footnote continued on page 21)

The question is whether income can be said to be held "for future distribution to the grantor" when no one knows to whom the accumulated income will be distributed. The statute is unequivocal in its wording. It uses the word "is". The respondent's contention, in effect, is that the word "is" means "is probably" or "may be" or perhaps even "is possibly". In common usage the word "is" is never used as synonymous with any of the last three expressions above quoted.

In using words of common usage in the Revenue Acts, the Congress means to employ the ordinary meaning of the terms used. *Woolford Realty Co.* v. *Rose*, 286 U. S. 319, 327 (1932); *Old Colony Railroad Co.* v. *Commissioner*, 284 U. S. 552, 560 (1932); *Lynch* v. *Alworth-Stephens Co.*, 267 U. S. 364, 370 (1925). This Court refuses to assume that the Congress uses terms in the Revenue Act "with reference to 'some esoteric concept derived from subtle and theoretic analysis'" and "cannot sacrifice the 'plain, obvious and rational meaning' of the statute even for 'the exigency of a hard case'." *Deputy* v. *duPont*, 308 U. S. 488, 498 (1940).

It is perfectly clear in the instant case that the income in question was accumulated in trust for future distribution to a person or to persons whose identity could not be determined. The fiduciary had to determine its tax liability as to the 1932 accumulations by a consideration of the facts as they existed at the end of 1932. Similarly, it had to determine its tax liability with respect to the 1933 and 1934 accumulations at the end of each of those years. At

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(Footnote continued from page 20)

Unless the annual income of each trust exceeds $66,666.66, the petitioner will derive no economic benefit whatever from said income.

In only one of the four years, the facts with respect to which are before this Court, did the income of any of the trusts exceed $66,666.66.

the end of each year, it was impossible for the fiduciary to say for whom it was holding the accumulations. The person or persons to whom these accumulations would eventually be paid could not be determined. It is clear, as a factual matter, that the fiduciary would have had to possess clairvoyant powers if it attempted to determine at the end of any particular year for whom it held the accumulations.

The decided cases support the proposition that the income was accumulated for a person or persons whose identity could not be determined. Some of the cases use the term "unascertained persons" and others "persons with contingent interests", but as Judge KIRKPATRICK remarked, "It is by no means easy to draw a line between the two."

In *Commissioner* v. *Dean*, 102 F. (2d) 699 (C. C. A. 10th, 1939), it was held that where income could not be paid to a beneficiary unless he lived *three days* after the close of the taxable year the fiduciary could not assume that he would live for three days thereafter and that the income was held for unascertained persons at the end of the year and hence was taxable to the fiduciary. The court said:

> "Plainly, respondent did not have a present vested right to the money at the end of the calendar year. He had only a prospective contingent right which could not ripen into a present vested right before the close of the administrative year. Although only three days intervened between the dates on which the respective years ended, the income was not currently distributable at the close of the calendar year. It was held at that time for the benefit of unascertained persons or persons with contingent interests; *it was held for persons whose identity could not be ascertained until the end of the administrative year.*" (Italics added.)

In the *Dean* case the issue was whether the income was taxable to the fiduciary or to the beneficiary. The government would have collected a larger tax if the income had been held to be taxable to the beneficiary. The court had to decide whether it could say that the income in that case was to be distributed currently to the beneficiary or was accumulated in trust for the benefit of persons whose identity could not be determined. The issue was whether it could be said on December 31st of any year that the income was to be distributed currently to this particular beneficiary. The court held that it could not be so determined because the beneficiary might die within the period of three days after the close of the taxable year and that, therefore, it could not be said that this income was to be distributed currently to the particular beneficiary whom the government sought to tax.

The identical situation is involved in the instant case. The issue is whether the income is taxable to the fiduciary or to the beneficiary (in this instance, the grantor). The government will receive a larger tax if the income is taxed to the beneficiary. Nevertheless, since it cannot be said on December 31st of any year that the income is held or accumulated for future distribution to the grantor, it necessarily follows that the income is held or accumulated in trust for the benefit of persons whose identity cannot be determined.

That the income in the instant case was accumulated for persons whose identity could not be determined is also clear from other decisions.

In *De Brabant* v. *Commissioner*, 90 F. (2d) 433 (C. C. A. 2nd, 1937), the court said that the words "unascertained persons" referred "to those whose identification depends on future contingencies".

So also in *Ferguson* v. *Forstmann*, 25 F. (2d) 47 (C. C. A. 3rd, 1928), *Hart* v. *Commissioner*, 54 F. (2d) 848 (C. C. A. 1st, 1932), and *Commissioner* v. *Owens*, 78 F. (2d) 768 (C. C. A. 10th, 1935), the court held that the words "unascertained persons" referred to a person who was not definitely known or determined. They were all cases in which the income was accumulated pending litigation between rival claimants. In the *Owens* case, the court said:

> "The New Century Dictionary defines unascertained as follows: 'Not certainly known or determined.' Webster's New International Dictionary defines ascertained as follows: 'To find out or learn for a certainty by trial, examination, or experiment.'
>
> "We are of the opinion that 'unascertained persons,' as used in the statutes here involved, embraces one who occupies a particular status, such as owner, heir, *cestui que* trust, and the like, but who is not definitely known or determined."

In *Eustis* v. *Commissioner*, 30 B. T. A. 820 (1934), the taxpayer's right to the income depended upon his living until the June 15th of the year succeeding that in which the accumulation occurred. In that case, the Board said:

> "The petitioner's right to receive the income in controversy being dependent upon his being alive on some date in the future, and the continuance of life until any particular date in the future being one of the most uncertain things known to human experience, we think the petitioner's interest in the income was highly contingent and at most constituted only a possibility."

D. Since the income of the trusts was held or accumulated for future distribution to a person or to persons whose identity could not be determined until the happening of unpredictable events, it could not have been held or accumulated for future distribution to the grantor.

We submit that "a person or persons whose identity can not be determined until the happening of unpredictable events" is not the equivalent of "the grantor". The Circuit Court of Appeals, however, has held that the clause first quoted is the equivalent of the phrase last quoted.

A reading of Section 161(a)[21] and 167 in the light of familiar rules of statutory construction demonstrates that Congress did not intend the phrase "distribution to the grantor" to mean the equivalent of distribution to a person or to persons whose identity could not be determined until the happening of unpredictable events.

Section 161(a), so far as pertinent,[22] provides:

> The taxes imposed by this title upon individuals shall apply to the income of . . . any kind of property held in trust, including—
>
> (1) Income *accumulated in trust for the benefit of* unborn or unascertained persons or persons with contingent interests, and *income accumulated or held for future distribution* under the terms of the will or trust.

The verb "accumulated" is used twice, in each case with a different combination of words. First,—the combination is "accumulated in trust for the benefit of". Second,—the combination is "accumulated or held for future distribu-

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[21] 47 Statutes at Large, Public Volume I, p. 219; 48 Statutes at Large, Public Volume I, p. 727, U. S. C. (1934 ed.) p. 1058.

[22] The section is quoted in full in the Appendix to this brief, beginning at page 31.

tion". The first clause by its terms deals with the accumulation of income for the benefit of unborn and unascertained persons and persons with contingent interests,—for the benefit of persons whose identity can not be determined until the happening of unpredictable events. The second clause must of necessity relate to income accumulated or held for future distribution to persons other than unborn and unascertained persons, to persons other than persons with contingent interests;—it must relate to income accumulated or held for future distribution to persons whose identity can be determined at the time of the accumulation without regard to future events.

The counterpart of Section 167 first appeared in the Revenue Act of 1924. When the Revenue Act of 1924 was being considered by Congress the Revenue Act of 1921 was in effect. Section 219(a)(2) and (3)[23] of the Revenue Act of 1921 was identical with Section 161(a)(1) of the Revenue Acts of 1932 and 1934 which we are now considering. Congress, in enacting the Revenue Act of 1924, therefore knew that it was amending the language which we have analyzed above.

Section 219(h)[24] of the Revenue Act of 1924, provided so far as pertinent:[25]

> Where any part of the income of a trust may . . . be *held or accumulated for future distribution* to him (the grantor), . . . such part of the income of the trust shall be included in computing the net income of the grantor.

Thus Congress having before it a statute which specifically enumerated the classes of income accumulated in trust,

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[23] 42 Statutes at Large, Public Volume I, p. 246.

[24] 43 Statutes at Large, Public Volume I, p. 277.

[25] The section is quoted in full in the Appendix to this brief, beginning at page 31.

and wishing to amend that statute to provide that accumulated income to be paid to the grantor in the future should be taxed to the grantor, deliberately refused to adopt the language of the existing statute ("accumulated in trust for the benefit of") which related to income accumulated or held for future distribution to persons whose identity *could not be* determined until the happening of unpredictable events and elected to use, in the amendment, the language ("accumulated or held for future distribution") which related to income accumulated for the benefit of persons whose identity *could be* determined at the time of the accumulation.

One can readily follow the reasoning of the draftsman of Section 219(h) of the Revenue Act of 1924. He knew that the law then in existence laid down the general rule that the income of a trust was taxable to the trustee. He knew that his task was to provide an exception to that rule, namely that income accumulated for the benefit of the grantor should be taxable to the grantor. He turned to Section 219(a) (2) of the Revenue Act of 1921 where accumulated income of a trust is first mentioned. He read:

> "Income *accumulated in trust for the benefit of* unborn or unascertained persons or persons with contingent interests."

In Section 219(a) (3) he read:

> "*Income held for future distribution* under the terms of the will or trust."

For his purposes the language of either Section 219(a) (2) or Section 219(a) (3) was satisfactory. He could, in drafting Section 219(h), say:

> "Where any part of the income of a trust *may . . . be accumulated in trust for the benefit* of the grantor, such part of the income shall be included in computing the net income of the grantor."

or

> "Where any part of the income of a trust may . . . be *held for future distribution* to the grantor, such part of the income of the trust shall be included in computing the net income of the grantor."

He realized, however, that the language of Section 219(a) (2) related to income accumulated for future distribution to persons whose identity could not be determined until the happening of unpredictable events, whereas Section 219(a) (3) related to income accumulated for the benefit of persons whose identity could be determined at the time of the accumulations without regard to future events. He therefore *passed over* the language of Section 219(a) (2) and *adopted* the language of Section 219(a) (3) as follows:

> "Where any part of the income of a trust may . . . be held or accumulated for future distribution to him (the grantor) such part of the income of the trust shall be included in computing the net income of the grantor."

We submit that Section 167 was not intended to tax to the grantor the accumulated income of a trust when the accumulation was as here for the benefit of a person or persons whose identity could not be determined at the time of the accumulation.

If Congress had intended that accumulated income which *might* be paid to the grantor in the future should be taxed to the grantor, it would have been an easy task to so provide.

> ". . . where Congress has drawn a distinction, however nice, it is not proper for us to obliterate it." (*Helvering* v. *Wood*, 309 U. S. 344, 347.)

Petitioner's position is supported by a series of decisions of the United States Board of Tax Appeals, in only one of which has the government prosecuted an appeal on this point.

In *Baker* v. *Commissioner*, 43 B. T. A. 1029, decided March 19, 1941, two types of accumulations were possible under the terms of the trust,—(1) capital gains and (2) a part of the income was to be accumulated during the minority of the grantor's son. As to a part of the capital gains and as to the income accumulated during the minority of the son, the grantor was to receive distribution thereof if his son died without issue prior to arriving at the age of thirty-five years and if the grantor were alive at the time of his son's death. As to the balance of the capital gains, the grantor was to receive distribution thereof if his son died, during his mother's lifetime, without issue prior to arriving at the age of thirty-five years, or if said son died, after the death of his mother, prior to attaining the age of thirty-five years, and if the grantor were alive at the time of the death of the survivor of the son and the mother. A part of the accumulated income was therefore held and accumulated for future distribution to the grantor, *if* he survived his son, and *if* his son did not live to be thirty-five years of age, and *if* the son left no issue. The balance of the accumulated income was held and accumulated for future distribution to the grantor, *if* he survived both his wife and his son, *if* his son did not live to be thirty-five years of age and *if* the son left no issue. The Board held that the income was not held or accumulated for future distribution to the grantor within the meaning of Section 167. The *Baker* case is identical in principle with the instant case. The accumulated income in the instant case was held or accumulated for distribution to the petitioner *if* it was not diminished by expenses, *if* the petitioner lived until the June 30th and December 31st of the second year following the accumulation, *if* during the year following the year of accumulation designated amounts were paid to the living children of petitioner from the current income of the trusts, or if any of said children were not living

during the year subsequent to the year of accumulation *if* $10,000. of current income was paid to or for the benefit of each surviving child of such deceased child.

To the same effect are *Boeing* v. *Commissioner*, 37 B. T. A. 178; *Pycatt* v. *Commissioner*, 39 B. T. A. 774; *Moore* v. *Commissioner*, 39 B. T. A. 808; *Estate of Edward Johnson* v. *Commissioner*, unreported memorandum decision of the United States Board of Tax Appeals entered May 29, 1939; *Ward* v. *Commissioner*, 40 B. T. A. 225; *McLean* v. *Commissioner*, 41 B. T. A. 565; and *Wilson* v. *Commissioner*, 42 B. T. A. 1260.

The government appealed the *Boeing*[25a] case but abandoned its appeal on this issue. It appealed the *Ward*[26] case, but failed to appeal on the issue involved in this case. The taxpayer appealed the *McLean*[27] case on other issues and the government did not cross-appeal. None of the other cases, except the *Wilson* case, was appealed. The appeal in the *Wilson* case has not been decided.

Conclusion.

It is, therefore, respectfully submitted that the Petition for Writ of Certiorari should be granted as prayed for.

Respectfully submitted,

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[25a] 106 F. (2d) 305.
[26] 119 F. (2d) 207.
[27] 120 F. (2d) ....., June 20, 1941.

APPENDIX.

Revenue Acts of 1932 and 1934.

SEC. 161. IMPOSITION OF TAX.

(a) Application of tax.—The taxes imposed by this title upon individuals shall apply to the income of estates or of any kind of property held in trust, including—

(1) Income accumulated in trust for the benefit of unborn or unascertained persons or persons with contingent interests, and income accumulated or held for future distribution under the terms of the will or trust;

(2) Income which is to be distributed currently by the fiduciary to the beneficiaries, and income collected by a guardian of an infant which is to be held or distributed as the court may direct;

(3) Income received by estates of deceased persons during the period of administration or settlement of the estate; and

(4) Income which, in the discretion of the fiduciary, may be either distributed to the beneficiaries or accumulated.

(b) Computation and payment.—The tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary, except as provided in section 166 (relating to revocable trusts) and section 167 (relating to income for benefit of the grantor). For return made by beneficiary, see section 142.

SEC. 162. NET INCOME.

The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

(a) There shall be allowed as a deduction (in lieu of the deduction for charitable, etc., contributions authorized by section 23 (n) [28] any part of the gross income, without limi-

[28] Section 23 (o) in the 1934 law.

tation, which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in section 23 (n),[28a] or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, or for the establishment, acquisition, maintenance or operation of a public cemetery not operated for profit;

(b) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, and the amount of the income collected by a guardian of an infant which is to be held or distributed as the court may direct, but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. Any amount allowed as a deduction under this paragraph shall not be allowed as a deduction under subsection (c) of this section in the same or any succeeding taxable year;

(c) In the case of income received by estates of deceased persons during the period of administration or settlement of the estate, and in the case of income which, in the discretion of the fiduciary, may be either distributed to the beneficiary or accumulated, there shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is properly paid or credited during such year to any legatee, heir, or beneficiary, but the amount so allowed as a deduction shall be included in computing the net income of the legatee, heir, or beneficiary.

SEC. 166. REVOCABLE TRUSTS.

Where at any time during the taxable year [29] the power to revest in the grantor title to any part of the corpus of the trust is vested—

(1) in the grantor, either alone or in conjunction with any persons not having a substantial adverse interest in

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[28a] Section 23(o) in the 1934 law.

[29] The words "during the taxable year" were omitted in the 1934 law.

the disposition of such part of the corpus or the income therefrom, or

(2) in any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom,

then the income of such part of the trust for such taxable year [30] shall be included in computing the net income of the grantor.

SEC. 167. INCOME FOR BENEFIT OF GRANTOR.

(a) Where any part of the income of a trust—

(1) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be, held or accumulated for future distribution to the grantor; or

(2) may, in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income, be distributed to the grantor; or

(3) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be, applied to the payment of premiums upon policies of insurance on the life of the grantor (except policies of insurance irrevocably payable for the purposes and in the manner specified in section 23(n),[31] relating to the so-called "charitable contribution" deduction);

then such part of the income of the trust shall be included in computing the net income of the grantor.

(b) As used in this section, the term "in the discretion of the grantor" means "in the discretion of the grantor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of the part of the income in question".

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[30] The words "for such taxable year" were omitted in the 1934 law.

[31] Section 23 (o) in the 1934 law.

Revenue Act of 1924.

SEC. 219. (h) Where any part of the income of a trust may, in the discretion of the grantor of the trust, either alone or in conjunction with any person not a beneficiary of the trust, be distributed to the grantor or be held or accumulated for future distribution to him, or where any part of the income of a trust is or may be applied to the payment of premiums upon policies of insurance on the life of the grantor (except policies of insurance irrevocably payable for the purposes and in the manner specified in paragraph (10) of subdivision (a) of section 214), such part of the income of the trust shall be included in computing the net income of the grantor.

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413075—41

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 537

A. ATWATER KENT, PETITIONER

v.

WALTER J. ROTHENSIES, COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF PENNSYLVANIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania (R. 3–11) is reported in 35 F. Supp. 291. The opinion of the Circuit Court of Appeals (R. 92–98) is reported in 120 F. (2d) 476.

JURISDICTION

The judgment of the court below was entered May 22, 1941 (R. 99). The petition for a writ of certiorari was filed August 22, 1941. The jurisdic-

tion of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The petitioner created three trusts to pay specified amounts of income therefrom to each of his three children and to accumulate the remaining income for a period of two years to be distributed to him at that time, if living. The petitioner retained substantial control over the management of the trusts and the excess amounts accumulated for distribution to him were considerably in excess of the amounts paid to the children. Is petitioner taxable upon such accumulated income during the year it was earned under either Section 22 or Section 167 of the Revenue Acts of 1932 and 1934?

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra,* pp. 8–10.

STATEMENT

The facts as stipulated by the parties (R. 13–85) may be summarized as follows:

On May 20, 1932, petitioner executed three trusts in the names of his three children, Elizabeth Kent Van Alen, Virginia Tucker Kent, and A. Atwater Kent, Jr. (R. 13–14, 21–58). Petitioner and a trust company were trustees of each of the trusts. (R. 13–14.)

Petitioner transferred to each of these trusts some 28,762 shares of preferred dividend stock in Atwater Kent Manufacturing Company. Each trust was to continue until the death of the survivor of the grantor's wife and the child whose name the particular trust bore (R. 25, 37, 49).

Under Section I of each of the trust instruments, it was provided that after payment of certain specified amounts from the year's income from the trust property to the child indentified with the trust, here, the balance of the income should be accumulated and held by the trustees for a period of two years, at the end of which time it was to be distributed to petitioner, if living, on the date named for distribution (R. 23, 35–36, 48). The dates of distribution were designated as the June 30 and the December 31 following the expiration of the two years after the income was earned (R. 23, 35, 47–48). If the grantor were not living on the payment dates the accumulated income was to go to named beneficiaries who were members of the petitioner's family (R. 24–25, 36–37, 49–50). After the grantor's death, the practice of accumulating income was to be discontinued and all of the income, except the amounts paid to the child whose name the trust bore, was to be currently distributed to petitioner's wife or the other named beneficiaries (R. 24, 37, 49).

The payments of current income to be made to the named child under each trust were shown by

schedules attached to each of the trust instruments. No payments were to be made to Virginia Tucker Kent or A. Atwater Kent, Jr., during any of the years here involved (R. 44–45, 57). Payments to Elizabeth Kent Van Alen were to begin in 1933, in which year she was to receive $10,000, which amount was to be increased by $5,000 in each of the succeeding years until the annual payment reached $75,000 (R. 32).

In addition to the current payments to the children out of the income, the trustees were authorized on each June 30 and December 31 to use not in excess of $5,000 of the accumulations being held to that date as might be necessary to bring the current payments for the last preceding calendar year up to the maximum amount payable to the child under the schedule contained in each of the trust instruments (R. 23, 35, 47–48).

During the years 1932–1934, each of the three trusts had income greatly in excess of the payments, if any, required to be made to the named beneficiaries other than the grantor (R. 14–15). Pursuant to the terms of the trust instruments the income, less the current payments to Elizabeth Kent Van Alen in 1933 and 1934, was accumulated and held by the trustees for two years following its receipt. At the end of the two years these amounts, reduced only by disbursements for income taxes and minor items, were, on the dates designated for distribution, paid to petitioner (R. 15–16).

Each of the trust instruments provided that none of the stock of the Atwater Kent Manufacturing Company or of any other corporation in which the petitioner held the majority of stock could be sold by the trustees without the grantor's consent (R. 26–27, 39, 51–52). The trust instruments further provided that the trustees could lend money with or without security to the Atwater Kent Manufacturing Company or other Atwater Kent company, or any successor thereof and should not be held accountable for loss on account of such loans (R. 28, 40, 52).

In his income tax returns for the years 1932–1934, inclusive, petitioner did not include in his income any part of the amount accumulated under the three trusts (R. 16–17). The Commissioner of Internal Revenue assessed deficiencies against petitioner based on the inclusion in his income for each of the three years of the amounts accumulated in the trusts. Petitioner paid the deficiencies and brought suit for refund. The District Court held that the accumulated income was not taxable to petitioner (R. 2–12), but the Circuit Court of Appeals reversed the judgment of the District Court (R. 92–99).

ARGUMENT

The court below correctly held that the accumulated income was taxable to the grantor under Sec-

tion 167 (a) (1) of the Revenue Acts of 1932 and 1934, which provides:[1]

> SEC. 167. INCOME FOR BENEFIT OF GRANTOR.
>
> (a) Where any part of the income of a trust—
>
> (1) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be, held or accumulated for future distribution to the grantor;
>
> * * * * *
>
> then such part of the income of the trust shall be included in computing the net income of the grantor.

The fact that the happening of a contingency (such as the death of the grantor before the period of distribution) may prevent him from receiving the accumulated income does not change the operation of Section 167 (a) (1). At least three other circuit courts of appeals have so ruled in situations where the contingencies were in fact greater and the periods of accumulation much longer. *Kaplan* v. *Commissioner,* 66 F. (2d) 401 (C. C. A. 1st); *Altmaier* v. *Commissioner,* 116 F. (2d) 162

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[1] The Government also contended below that the taxpayer was chargeable with the income in controversy under Section 22 (a). In holding the income taxable under Section 167 (a) (1) the court below found it unnecessary to pass upon the applicability of Section 22 (a). If the petition is granted, however, we intend to renew our contention that both Section 22 (a) and Section 167 (a) (1) support the tax.

(C. C. A. 6th), certiorari denied, 312 U. S. 706; *Graff* v. *Commissioner,* 117 F. (2d) 247 (C. C. A. 7th).

There are no decisions of any circuit court of appeals to the contrary. *Commissioner* v. *Dean,* 102 F. (2d) 699 (C. C. A. 10th), relied upon by petitioner, is not in conflict with the decision below. The question in the *Dean* case was whether certain income was taxable to the beneficiary of a trust under Section 162 (b) of the Revenue Act of 1928 where, under the terms of the trust, it was not to be distributed to him until the succeeding year. But under Section 162 (b) a beneficiary is taxable only upon income "which is to be distributed currently by the fiduciary." The provisions here involved, on the other hand, were expressly designed to render the grantor liable with respect to income that is not currently distributable.

CONCLUSION

The petition should be denied.

Respectfully submitted.

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SEPTEMBER 1941.

APPENDIX

Revenue Act of 1932, 47 Stat. 169:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * * *

SEC. 161. IMPOSITION OF TAX.

(a) *Application of Tax.*—The taxes imposed by this title upon individuals shall apply to the income of estates or of any kind of property held in trust, including—

(1) Income accumulated in trust for the benefit of unborn or unascertained persons or persons with contingent interests, and income accumulated or held for future distribution under the terms of the will or trust;

(2) Income which is to be distributed currently by the fiduciary to the beneficiaries, and income collected by a guardian of an infant which is to be held or distributed as the court may direct;

(3) Income received by estates of deceased persons during the period of

administration or settlement of the estate; and

(4) Income which, in the discretion of the fiduciary, may be either distributed to the beneficiaries or accumulated.

(b) *Computation and payment.*—The tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary, except as provided in section 166 (relating to revocable trusts) and section 167 (relating to income for benefit of the grantor). * * *

SEC. 167. INCOME FOR BENEFIT OF GRANTOR.

(a) Where any part of the income of a trust—

(1) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be, held or accumulated for future distribution to the grantor; or

(2) may, in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income, be distributed to the grantor; * * *

* * * * *

then such part of the income of the trust shall be included in computing the net income of the grantor.

(b) As used in this section, the term "in the discretion of the grantor" means "in the discretion of the grantor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of the part of the income in question".

Similar provisions will be found in Sections 22, 161 and 167 of the Revenue Act of 1934, 48 Stat. 680 (U. S. C., Title 26, Secs. 22, 161, 167).

Treasury Regulations 86, promulgated under the Revenue Act of 1934:

> ART. 167–1 [as amended by T. D. 4860, 1938–2 Cum. Bull. 184].—*Trusts in the income of which the grantor retains an interest.*—
>
> * * * * *
>
> (b) *Test of taxability to the grantor.*—The test prescribed by the Act as to the sufficiency of the grantor's retained interest in the trust income, resulting in the taxation of such income to the grantor, is whether he has failed to divest himself, both permanently and definitively, of every right which might, by any possibility, enable him to have such income, at some time, distributed to him, either actually or constructively. * * *

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SEP 24

IN THE

Supreme Court of the United States

October Term 1941

No. 537

A. ATWATER KENT,
Petitioner,

v.

WALTER J. ROTHENSIES, Collector of Internal Revenue for the First District of Pennsylvania,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITIONER'S REPLY BRIEF.

ROBERT H. MONTGOMERY,
JAMES O. WYNN,
THOMAS G. HAIGHT,
LEIGHTON P. STRADLEY,
MAURICE T. MOORE,
J. MARVIN HAYNES,
CHESTER J. McGUIRE,
GEORGE G. TYLER,
Counsel for Petitioner.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITIONER'S REPLY BRIEF.

I.

The writ should not be denied because of the cases cited by the respondent as being in accord with the decision of the Circuit Court of Appeals below.

The respondent states on page 6 of his brief that *Kaplan* v. *Commissioner* (66 F. (2d) 401), *Altmaier* v. *Commissioner* (116 F. (2d) 162), and *Graff* v. *Commissioner* (117 F. (2d) 247) are to the effect that "The fact that the happening of a contingency (such as the death of the grantor before the period of distribution) may prevent him from receiving the accumulated income does not change the operation of Section 167 (a) (1)."

In the first place the petitioner's right, in the case at bar, to receive the accumulated income which has been taxed to him did not depend solely, as the respondent implies, upon his being alive at the time of distribution. That right depended also on the amounts of income distributed to his children during the year preceding the time of distribution. Contrary to the last sentence on page 4 of respondent's brief, the actual amount of 1934 accumulations was $34,200. more than the distribution to the petitioner, and of this amount $20,000., or over fifty-eight per cent. thereof, was due to payments which the trustees were required to make to petitioner's children. (See page 7 of Petition for Writ of Certiorari, herein.)

In the second place the rights to the accumulated income of the grantors in the cases cited by the respondent depended not so much upon "a contingency (such as the death of the grantor before the period of distribution)" as upon the exercise of the *grantor's dominion* over the trust property.

In *Kaplan* v. *Commissioner* (66 F. (2d) 401) the grantor, as sole trustee, had discretionary power either to pay the income to his wife or accumulate it. If he exercised his discretion and accumulated the income, and if he survived his wife, he had the further discretionary power either to continue to hold the accumulation in trust or to distribute it to himself. The disposition of the income was thus in his unfettered control.

> "As Kaplan named himself trustee, the large discretion given in the trust instrument to the trustee as to the accumulation and payment of income is attributable to him personally. By the terms of the trust that discretion can be exercised for his own possible benefit, within wide limits." (66 F. (2d) 402.)

In *Altmaier* v. *Commissioner* (116 F. (2d) 162), the grantor, together with his wife, had the discretion of terminating the trust at any time and cause the accumulated income to be paid to the grantor. The Court held that the fact that the wife's concurrence was required should be disregarded; thus holding, in effect, that the grantor, in his sole discretion, might at any time cause the accumulated income to be paid to himself.

In *Graff* v. *Commissioner* (117 F. (2d) 247), it was not even held that Section 167 (a) (1) (the only section upon which the respondent relies in this case) was applicable. The trust was revocable by the grantor with the consent of his wife. The Court held that the wife did not have a substantial adverse interest as to the accumulated income in question and that the said income was taxable to the grantor by virtue of Section 166 [1] and Section 167 (a) (2).[2]

From the foregoing it is apparent that in each of the cases cited by the respondent the decision was based on the fact that the disposition of the accumulated income was in the unfettered control of the grantor.[3] On the other hand in the case at bar, the petitioner had no control whatever over the disposition of the accumulated income.

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[1] See pages 32 and 33 of Petition for Writ of Certiorari and Supporting Brief, herein.

[2] See page 33 of Petition for Writ of Certiorari and Supporting Brief, herein.

[3] *Graff* v. *Commissioner* (117 F. (2d) 247), was decided after the decision of the District Court herein (favorable to the petitioner). That the Court did not consider the decision of the District Court in the case at bar as in conflict with its own decision is apparent from the following:

> "We do not regard *Commissioner* v. *Branch*, 1 Cir., 114 F. 2d 985, or *Kent* v. *Rothensies*, D. C., 35 F. Supp., 291, in point as to the facts found here. If so they are not controlling."

Finally, even if it should be held that the three cases support the decision of the Circuit Court of Appeals below,[4] we submit that, if that be true, said cases are in conflict with the decision in *Commissioner* v. *Dean* (102 F. (2d) 699), and that this Court should assume jurisdiction in order to quiet the present confusion in the decisions of the several circuits. The fact that the *Dean* case was an interpretation of Section 162 (b) and that the decision below in the case at bar was an interpretation of Section 167 (a) does not, as the respondent suggests, make them any the less conflicting. The *Dean* case held that income accumulated and held on December 31 for future distribution to a named beneficiary if he were living on the succeeding January 3 was "held for persons whose identity could not be ascertained until the end of the administrative year", *i. e.*, until January 3. The decision in the case at bar holds that income accumulated and held on December 31 for future distribution to a named beneficiary if he be living on the June 30 and December 31 of the second year thereafter was held for such beneficiary.

[4] It is significant that while the three cases were cited in the respondent's brief below, the Circuit Court of Appeals does not mention them in its opinion. Obviously, the Circuit Court of Appeals below did not consider the three cases precedents for its decision.

II.

The writ prayed for should be granted because of confusion existing as to the meaning of the decision of this Court in *Helvering* v. *Clifford* (309 U. S. 331), which confusion is indicated by the respondent's announced intention to contend that the petitioner is taxable on the income of the trust here involved by virtue of Section 22(a)[5] of the Revenue Acts of 1932 and 1934.

The respondent correctly states in a footnote on page 6 of his brief that the Circuit Court of Appeals found it unnecessary to pass upon the applicability of Section 22(a) to the income of the trusts herein involved. He states, however, that he intends, if the petition herein prayed for is granted, to renew his contention that Section 22(a) supports the tax.

As the respondent intends to ask this Court to hold the petitioner liable under Section 22(a) and thus to extend the doctrine of *Helvering* v. *Clifford*, 309 U. S. 331, the question should be put at rest by this Court, particularly in view of the decisions of the Circuit Courts of Appeals for the First and Second Circuits in *Commissioner* v. *Branch*, 114 F. (2d) 985 and *Helvering* v. *Palmer*, 115 F. (2d) 368.

In the *Branch* and *Palmer* cases, the government contended that the income from trusts was taxable to the grantors under Section 22(a) under the *rationale* of the decision of this Court in *Helvering* v. *Clifford*, 309 U. S. 331. In each of the cases the Circuit Courts of Appeals decided to the contrary. In each of said cases the facts supported

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[5] 47 Statutes at Large, Public Volume I, p. 178; 48 Statutes at Large, Public Volume I, p. 686, U. S. C. (1934 Ed.), p. 1039. See page 8 of Brief for the Respondent in Opposition, herein.

the government's contention far more than would the facts of the instant case.

Without burdening this Court with a detailed comparison of the several trusts, suffice it to say that in the *Branch* case, the grantor, without the concurrence of his co-trustees, who were absolved from liability for losses in connection therewith, had discretionary powers of sale, lease, partition and exchange of the trust property; to give options to purchase or lease; to sell for cash or on credit, to purchase from or sell to himself; to borrow money for the purpose of purchasing any investments which he might deem advisable and to pledge or mortgage the trust estate to secure such loans; to invest and reinvest without regard to the normal restrictions on investment of trust funds; to exercise rights of conversion, exchange or subscription in connection with any of the securities of the trust; to fill vacancies in the trustees; and to appoint additional trustees. The corpus of the trust was to revert to the grantor if he survived his wife. The grantor's wife had the power to revoke during the joint lives of herself and her husband.

In the *Palmer* case, the grantor, without the concurrence of his co-trustee (his wife, who was also the income beneficiary) had power to exercise all the powers vested in the trustees except that of adjusting the option price (or the formulae for determining the same) at which he had the right to buy the corpus of the trust. Included in the powers so vested in the grantor alone was the power to exercise freely and in his uncontrolled discretion, all the rights, powers and privileges appertaining to full and complete ownership of the trust property. The grantor had the right to name the successor of his co-trustee. The trust was to continue for a specified period of time after the death of the grantor's wife, whereupon the corpus was to be distributed to the grantor's issue.

On the other hand, in the case at bar, the only rights which the petitioner had (other than his rights as a co-trustee with a trust company) were (1) a power to veto a sale of any stock or other securities of the Atwater Kent Manufacturing Company, or of any reorganization thereof, or of any affiliated company, or of any other company of which the grantor owned the majority of the voting stock, (2) a power to compel the trustees to offer to sell to a person other than the grantor all or a part of the trust's holdings of Atwater Kent Manufacturing Company participating preferred stock[6] at the same price and on the same terms as he should have sold such person common stock of said company and (3) a power to compel the trustees to offer to sell to a person other than himself the trust's holdings of Atwater Kent Manufacturing Company preferred dividend stock at $100 per share, and on the same terms as he should have sold common stock of said company.

Conclusion.

The writ should be allowed.

Respectfully submitted,

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[6] The trusts actually owned no such stock.